

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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OCT 5 - 1995

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket 95-88
Table of Allotments,	)	RM-8641
FM Broadcast Stations.	)	RM-8688
(Rose Hill, Trenton, Aurora	)	RM-8689
and Ocracoke, North Carolina)	)	

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF GENERAL COUNSEL

DOCKET FILE COPY ORIGINAL

To: Chief, Allocations Branch

**OPPOSITION TO MOTION TO ACCEPT RESPONSIVE PLEADING**

Duplin County Broadcasters ("DCB"), by its attorneys, hereby opposes Aurora Broadcasting's ("AB's") September 20, 1995 "Motion To Accept Responsive Pleading" ("Motion"), which seeks acceptance of AB's "Response To Reply Of Duplin County Broadcasters To Counterproposal" ("Response"), in the above-captioned matter.

1. By way of pertinent background, DCB, the licensee of FM Station WBSY, Channel 284A, Rose Hill, North Carolina, seeks reassignment of Channel 284 from Rose Hill to Trenton, North Carolina; an upgrade of the allotment from Class A to Class C2; and modification of the license of WBSY accordingly. AB submitted a counterproposal to instead allot Channel 283A to Aurora, North Carolina, which would preclude DCB's proposal. Thereafter, by the "Reply of Duplin County Broadcasters to Counterproposal" (Reply, pp.5-7), DCB showed that Channel 221A can be allotted to Aurora as an alternative to Channel 283A, in order to resolve the conflict between the proposals and enable an allotment to be made to both communities. In response, AB professes concern (Response, pp.2-3) that DCB's proposed alternative allotment of Channel 221A at Aurora

is "blocked" by the earlier-filed application of Ocracoke Broadcasters ("OB") for one-step upgrade of WAHL, Ocracoke, North Carolina, from Channel 225A to Channel 224C1. AB also expresses concern (Response, p.3) that amendment to the application of American Family Association (FCC File No. BPED-950626MA) for a new NCE FM station at New Bern, North Carolina, to change frequency from Channel 220A to Channel 211A to accommodate the allotment of Channel 221A at Aurora, would not be a "simple" process.

2. At the outset, it should be noted that under Section 1.415 of the Commission's rules and prevailing policy, pleadings beyond the date for filing reply comments are not generally permissible in rule making proceedings to amend the FM Table of Allotments. See e.g. Bourbon and Columbia, Missouri, 6 FCC Rcd 250, 251, n.3 (Acting Chief, Alloc. Br., 1991). AB asks the Commission to nevertheless accept its Response, alleging that there are legal and factual inaccuracies in DCB's Reply (Motion, p.2). As will be shown below, however, it is AB's response that is plagued by inaccuracies. DCB's Reply is procedurally and substantively sound, and AB's supernumerary "response" should be rejected as procedurally improper and without decisional significance.

**A. Channel 221A, Aurora, is not blocked by prior application.**

3. AB would have the Commission consider DCB's proposed alternative allotment of Channel 221A at Aurora to be "blocked," by OB's earlier-filed application for a one-step upgrade of WAHL, Ocracoke, North Carolina, from Channel 225A to Channel 224C1 (FCC File No. BMPH-950728IC). AB cites Conflicts Between Applications

and Petitions For Rulemaking, 7 FCC Rcd 4917 (1992) ("Conflicts"), as establishing a priority system to protect one-step upgrade applications from subsequently-tendered rule making petitions. However, Conflicts accords no priority over subsequent rule making proposals to applications which are defective. It will be shown hereinbelow that the WAHL application will be returned as fatally defective under Section 73.315 of the Commission's rules, and thus poses no obstacle to the proposed Channel 221A Ocracoke allotment.

4. Attached hereto as Exhibit A is an Engineering Exhibit prepared by DCB's consulting engineer, William Culpepper & Associates, Inc. ("Culpepper"), which shows that the upgraded facility proposed by WAHL in its one-step application will not place a 70 dBu signal over WAHL's license community of Ocracoke, and therefore contravenes Rule Section 73.315(a)<sup>1/</sup>. In analyzing the Ocracoke upgrade application, Culpepper calculated the proposed 70 dBu contour by using the geographic coordinates, antenna height and power values specified in the application. Figure 1 of Culpepper's Engineering Exhibit shows that the proposed 70 dBu contour is approximately four kilometers short of the community's center<sup>2/</sup>. Culpepper's Exhibit further points out that Exhibit E-6 of OB's own

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<sup>1/</sup>It is worthwhile to note that OB previously petitioned in a formal rule making proceeding to upgrade the Ocracoke allotment from Channel 225A to Channel 224C1, MM Docket No. 93-214, and failed for the exact reason that it did not show that the predicted 70 dBu contour would encompass the license community. Ocracoke, Edenton, Columbia, Pine Knoll Shores, North Carolina, 9 FCC Rcd 2011 (Acting Chief, Alloc. Br., 1994).

<sup>2/</sup>Figure 2 of Culpepper's Engineering Exhibit further shows that the calculated 70 dBu contour for the allotment reference coordinates also falls short of covering the entire community.

application is a coverage map which shows that the upgraded station's 70 dBu contour falls short of the community center.

5. Notwithstanding this critical coverage deficiency, OB did not request a waiver of Rule Section 73.315, nor does it appear that with such an extreme signal shortfall OB would qualify for a waiver under present application processing policies. See e.g. Naguabo Broadcasting Co., 6 FCC Rcd 912, 915-916 (Rev. Bd. 1991). OB apparently erroneously stated at Section V-B, Item 11, of its application that its proposal complies with Rule Section 73.315. AB compounded that error by failing to diligently review OB's application prior to burdening the instant proceeding with its ill-founded supernumerary pleading.

**B. An amendment to AFA's Channel 220A, New Bern, application has cleared the way for a Channel 221A, Aurora, allotment.**

6. In its Reply, DCB noted (p.6) that although the application of American Family Association ("AFA") for a new non-commercial educational FM station on Channel 220A at New Bern, North Carolina (FCC File No. BPED-950626MA) would block the counterproposal for Channel 221A at Aurora, AFA had agreed to file a frequency change amendment to its pending application in order to accommodate the proposed Aurora allotment. At Exhibit B of the Reply, DCB attached a statement signed by Donald Wildmon, President of AFA, by which AFA agreed to file an amendment to its application, to specify Channel 211 in lieu of Channel 220. DCB noted that the Channel 221 allotment could be made to Aurora contingent on AFA amending to Channel 211, in accordance with the procedures set forth in Bisbee and Green Valley, Arizona, 6 FCC Rcd 1330 (Acting Chief, Alloc. Br.,

1991). In response, AB complains (p.4) that because AFA's channel change application is a "major" change which must go on a "cut-off" list, it may be blocked by other applications for the new channel.

7. Under cover of letter dated September 8, 1995, AFA filed an amendment to its application for Channel 220A at New Bern, to change channel to Channel 211A in order to accommodate the proposal for an allotment on Channel 221A at Aurora. The application was received by the Commission on September 11, 1995, as noted by FCC Public Notice, Report No. 23599, at page 2. As AFA has already filed its application to amend off of Channel 220A to clear the way to allot Channel 221A to Aurora, there is no cause for AB's concern that AFA's application may yet effect the instant proceeding. Any mutually exclusive applications that may be filed for AFA's new frequency, Channel 211, will have no effect on the proposed non-adjacent allotment of Channel 221 at Aurora.

**C. Conclusion.**

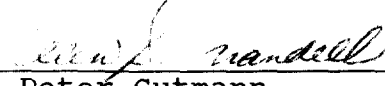
8. In sum, the supernumerary pleading which AB seeks to interject in the instant proceeding is based on erroneous premises, and is of no decisional significance. The defective application for upgrade of WAHL does not block favorable action on the proposal to allot Channel 221 to Aurora. AFA has amended its application for an NCE FM station on Channel 220 at New Bern, to specify Channel 211, in order to accommodate the proposal for Channel 221 at Aurora. Under these circumstances, DCB is perplexed as to why AB, the proponent of a new allotment for Aurora which is in conflict with DCB's proposed allotment for Trenton, would oppose DCB's showing

that there is an available allotment scheme which would permit channels to be assigned to both communities. Indeed, it is well-established Commission policy to endeavor to locate alternate allotments for conflicting proposals in rule making proceedings. See e.g. Rapid City and Lead, South Dakota, 10 FCC Rcd 7715 (Chief, Alloc. Br., 1995)

WHEREFORE, the premises considered, AB's "Motion To Accept Responsive Pleading" should be denied, AB's related "Response To Reply Of Duplin County Broadcasters To Counterproposal" should be dismissed as moot, and the proposal to substitute Channel 284C2 at Trenton, North Carolina, for Channel 284A at Rose Hill, North Carolina, and to modify the license of WBSY accordingly, should be granted.

Respectfully submitted,

**DUPLIN COUNTY BROADCASTERS**

By   
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October 5, 1995

DUPLIN COUNTY BROADCASTERS

WBSY

TRENTON, NORTH CAROLINA

ENGINEERING EXHIBIT

October 1995

William Culpepper & Associates  
900 Jefferson Drive  
Charlotte, NC 28270

DUPLIN COUNTY BROADCASTERS

TRENTON, NORTH CAROLINA

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DUPLIN COUNTY BROADCASTERS

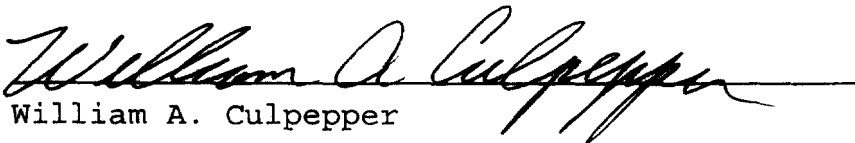
WBSY

TRENTON, NORTH CAROLINA

DECLARATION

I declare, under penalty of perjury, that I have prepared the attached Engineering Exhibit for Duplin County Broadcasters, and that all of the facts therein, except for facts of which the Federal Communications Commission may take official notice, are true to the best of my knowledge and belief; and that I am a Registered Professional Engineer in the State of North Carolina.

Executed on October 4, 1995.

  
William A. Culpepper

900 Jefferson Drive  
Charlotte, NC 28270  
704-365-9995

## DUPLIN COUNTY BROADCASTERS

### TRENTON, NORTH CAROLINA

#### NARRATIVE

This exhibit has been prepared for Duplin County Broadcasters. Its purpose is to demonstrate technical deficiencies in Ocracoke Broadcasters one-step application to upgrade its facility from channel 225A to 224C1 at Ocracoke, North Carolina (BMPH-950728IC).

The Ocracoke Broadcasters application for construction permit does not meet the requirements of §73.315(a). Figure 1 is a map that shows the proposed transmitter site, the Community of Ocracoke, and the 70 dBu contour. The distance to the contour was calculated by using the geographic coordinates, antenna height and power shown in the application.

As shown on Figure 1, the 70 dBu contour is approximately four kilometers from the center of the community. As further evidence that the application is deficient in city-grade coverage, refer to the coverage map in the Ocracoke Broadcasters application at E-6. This map also shows the 70 dBu contour approximately four kilometers short of the community center.

Figure 2 is a portion of the USGS 1:24,000 scale topographic map of Ocracoke. The eastern boundary of the Community of Ocracoke is defined by the boundary of the Cape Hatteras National Seashore. Figure 2 has a cross mark at the eastern boundary of the community which is at geographic coordinates 35° 06' 52" north latitude and 75° 57' 48" west longitude.

The distance from the allotment reference coordinates to this boundary is 50.17 kilometers on an azimuth of 055.6 degrees, as calculated by the method outlined in §73.208(c). Using the maximum power and antenna height of 100 kilowatts and 299 meters HAAT at the Ocracoke reference point, the 70 dBu contour falls at 50.0 kilometers, which is 0.17 kilometers short of the community boundary. A table of distances to the 70 dBu contour is shown on page 4.

DUPLIN COUNTY BROADCASTERS

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NARRATIVE...(continued)

This exhibit has shown that a class C1 facility operating at maximum permitted power and height at the Ocracoke reference point does not provide complete coverage of the principal community. It has also shown that the application for construction permit filed by Ocracoke Broadcasters falls far short of meeting the requirements of §73.315, therefore Ocracoke Broadcasters attempt to allocate channel 224C1 to Ocracoke by the "one-step" process has failed.

Predicted Signal Contours:

34 51 32 - DISTANCE TO THE 70 dBu CONTOUR FOR THE PROPOSED  
76 25 00 - ALLOTMENT OF CHANNEL 224C1 TO OCRACOEKE, NORTH CAROLINA

ERP = 100 kW, 20 dBk      FM - 2-6 Tables

Radial	HAAT	kW	dBk	Field	70 dBu.5
0 Degr.	299.0M	100.000	20.000	1.000	50.0
45 Degr.	299.0M	100.000	20.000	1.000	50.0
90 Degr.	299.0M	100.000	20.000	1.000	50.0
135 Degr.	299.0M	100.000	20.000	1.000	50.0
180 Degr.	299.0M	100.000	20.000	1.000	50.0
225 Degr.	299.0M	100.000	20.000	1.000	50.0
270 Degr.	299.0M	100.000	20.000	1.000	50.0
315 Degr.	299.0M	100.000	20.000	1.000	50.0

-----  
Ave. HAAT= 299.0M,    Ant. COR= 299.0M AMSL

Other Azimuths:

55 Degr.	299.0M	100.000	20.000	1.000	50.0
56 Degr.	299.0M	100.000	20.000	1.000	50.0

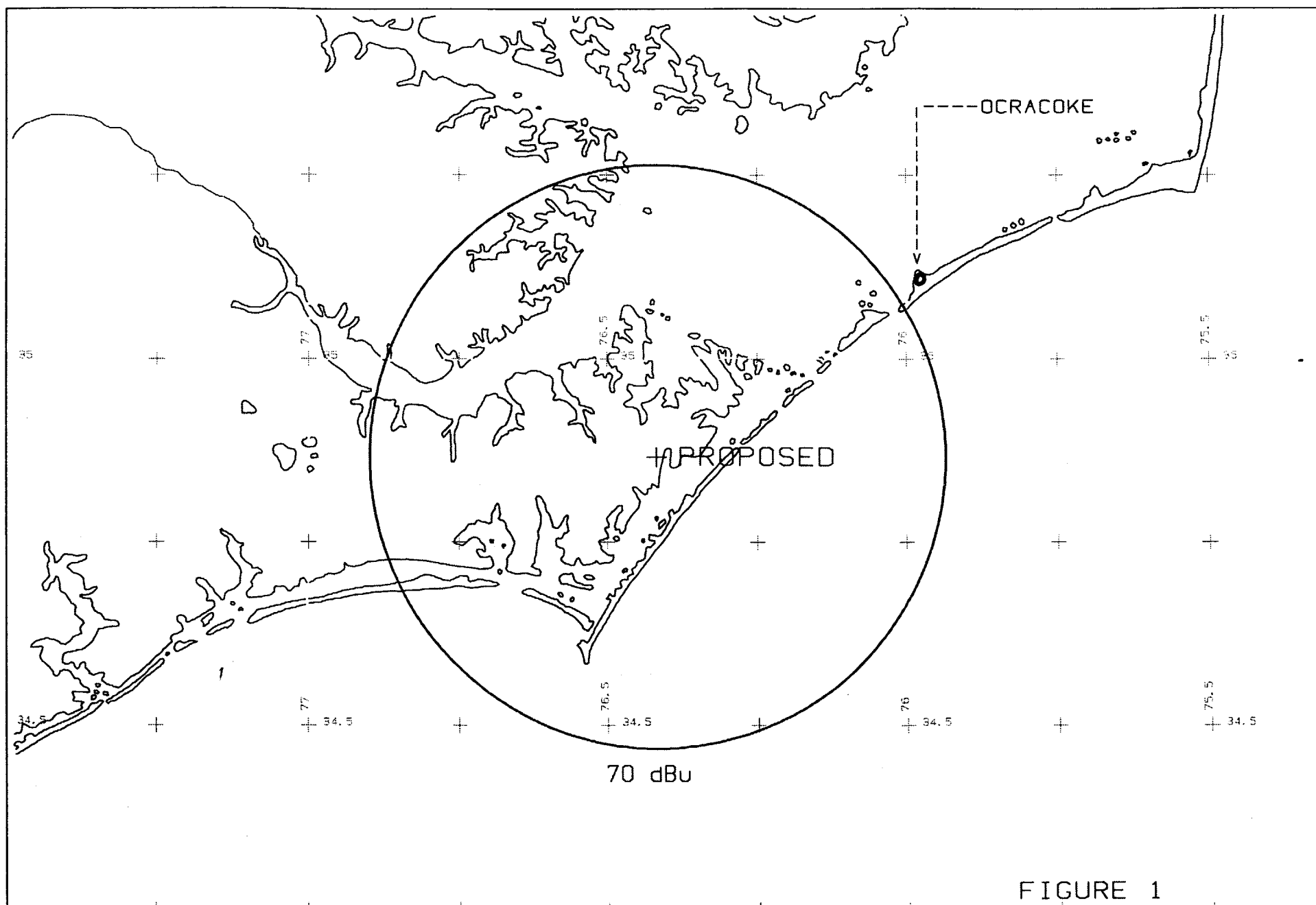
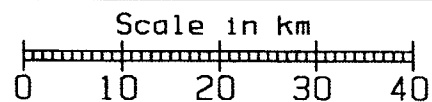


FIGURE 1



THE 70 dBu CONTOUR FOR WAHL AS PROPOSED  
BY OCRACOKE BROADCASTERS ON CHANNEL 224C1

DUPLIN COUNTY BROADCASTERS  
TRENTON, NORTH CAROLINA

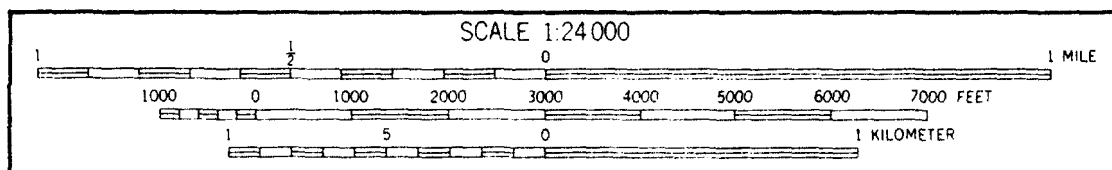
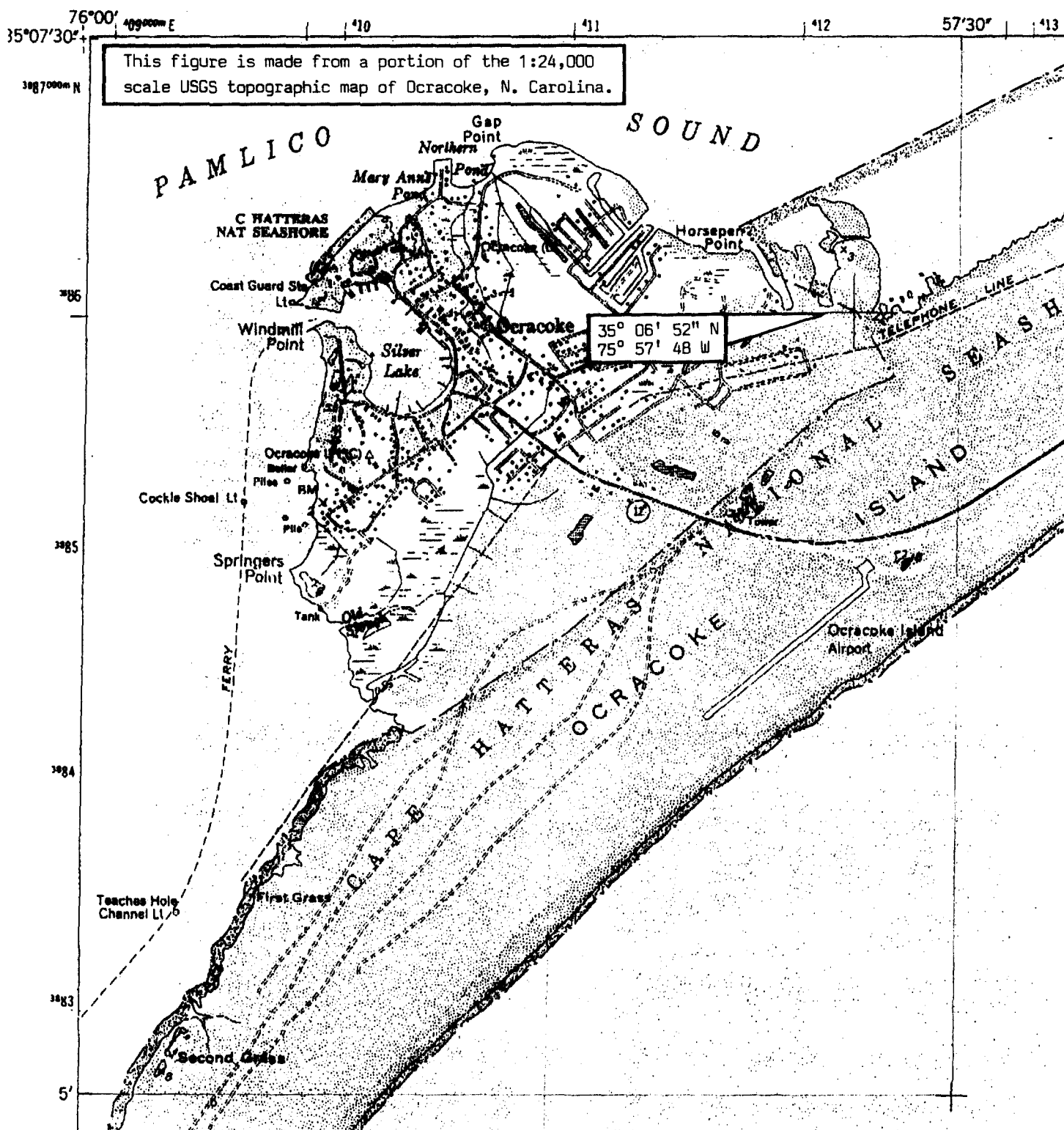


FIGURE 2

OCRACOE COMMUNITY BOUNDARY

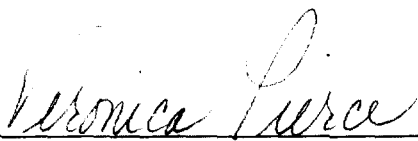
DUPLIN COUNTY BROADCASTERS  
TRENTON, NORTH CAROLINA

**CERTIFICATE OF SERVICE**

I, Veronica Pierce, do hereby certify that a true and correct copy of the foregoing "Opposition to Motion to Accept Responsive Pleading" has been served upon the following individuals by U.S. Mail on this 5th day of October, 1995.

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